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VIA FEDEX AND VIA E-MAIL [FLANAGAN.SARAH@EPA.GOV]

Sarah P. Flanagan, Esq.
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United States Environmental Protection Agency
Region II
290 Broadway, 17th Floor
New York, NY 10007-1866

Re: Lower Passaic River Study Area Operable Unit 2 -- Cash Out Settlement

Dear Ms. Flanagan:

On behalf of Honeywell International Inc. ("Honeywell"), we are writing to request that EPA negotiate a de micromis cash out settlement with Honeywell with respect to the Lower 8 Miles of the Lower Passaic River Study Area ("LPRSA"). Honeywell is entitled to a settlement pursuant to EPA's policy on settlement with de micromis parties, which asserts that "parties that contributed only very small amounts of waste" to a site "should not be pursued or otherwise compelled to expend transaction costs to resolve potential CERCLA liability."[1] EPA considers settlements with de micromis parties "to be a subset of *de minimis* settlements under CERCLA 122(g),"[2] which EPA is required by law to pursue as expeditiously as possible.[3]

Honeywell previously received both a General Notice Letter from EPA regarding the LPRSA, and a March 2016 Notice of Potential Liability for the Lower 8.3 Miles of the Lower Passaic River ("Notice of Potential Liability"). On March 4, 2016, EPA issued a Record of Decision ("ROD") for the Lower 8 Miles of the Lower Passaic River, which it designated as Operable Unit 2 ("OU 2") of the Diamond Alkali Superfund Site. In the Notice of Potential Liability, EPA indicated that (i) it was initiating discussions

[1] EPA, Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties at 2 (Nov. 6, 2002) (hereinafter "De Micromis Policy").

[2] *Id.*

[3] *See* 42 U.S.C. § 9622(g)(3); *see also* 42 U.S.C. § 9622(g)(10).

with Occidental Chemical Corporation to perform the Remedial Design for the remedy for the lower 8.3 miles of the Lower Passaic River, (ii) following execution of an administrative order for the remedial design, EPA would enter into discussions with "other major PRPs" regarding implementing the remedy (emphasis added), and (iii) EPA would be providing an opportunity for cash out settlements for OU 2. (EPA announced on October 5, 2016 that it had entered into a settlement with Occidental Chemical Corporation to perform the Remedial Design.)

For the reasons stated below, Honeywell is not liable for any contamination in OU 2, and therefore should not be responsible for the OU 2 remedial design or for the OU 2 remedy. However, to avoid continued transactional costs, Honeywell would be willing to consider settlement as a de micromis party. Given the lack of evidence of any nexus to contamination in the lower 8 miles of the Lower Passaic River, Honeywell is entitled to a prompt settlement with respect to OU 2.

Overview

EPA has alleged that Honeywell is connected to the LPRSA based on a property known as the Dundee Warehouse ("Warehouse"), located at approximately River Mile 14.7. The Warehouse is not associated with any specific documented release of a contaminant of concern to the Lower Passaic River. The industrial activities at the Warehouse did not include any of the principal contaminants driving the remedy at OU 2. The Warehouse was remediated under the oversight of the New Jersey Department of Environmental Protection ("NJDEP"), and the contamination found in the upland soils and groundwater at the Warehouse were acknowledged by the NJDEP to principally be related to historic fill material that is ubiquitous within the LPRSA. More importantly, EPA has provided no evidence that these contaminants actually migrated from the Warehouse to the river, or specifically to OU 2. EPA has thus failed to meet its burden to show that a release from the Warehouse caused response costs at OU 2, and so cannot impose liability on Honeywell for the remediation of OU 2.

Even assuming *arguendo* that hypothetical releases from the Warehouse actually migrated downstream six miles and caused a response cost in OU 2, any such harm would be divisible from the harm caused by the principal contaminants and releases driving the remediation of OU 2. The historic fill associated with the Warehouse is not related to the remedy drivers in OU 2. Accordingly, Honeywell cannot be jointly and severally liable for the costs of the OU 2 remedy.

Moreover, even assuming hypothetically for the purposes of argument that a small quantity of hazardous substances migrated to OU 2 from the Warehouse, any such quantity of hazardous substances would have been negligible (and likely not even measurable), compared to the total quantity of contamination at OU 2 or compared to the contribution of contamination from other sources, including background contributions from upstream of the Dundee Dam and sources that EPA has itself described as inconsequential. EPA's policy is that de micromis settlements should be pursued where a party's waste volume is "extremely small compared to the traditional *de minimis* party's volume," where "a party's contribution is still a minute percentage of the total waste volume sent to the site," or where a party is a "miniscule volume waste contributor."[4] Accordingly, at the least, Honeywell is entitled to a *de micromis* cash out settlement.

Background on Dundee Warehouse

Honeywell's predecessors owned and operated the Warehouse from 1899 until 1986. From 1899 to 1960 the Warehouse was operated as a bulk acid distribution facility and nitrating plant. Nitrating operations ceased in 1960, and acid distribution ceased some time prior to 1976. In general, until about 1920, nitric acid was typically produced from chile saltpeter (sodium nitrate), where sulfuric acid was mixed in a reaction chamber with chile saltpeter. Liquid sodium bisulphate is a by-product of this process.

In the early 20th century, the Ostwald process became the more widely used process in the production of nitric acid. The Ostwald process is a multistep process that oxidizes ammonia (NH_4) in air to form nitric oxide (NO) and water. The Ostwald process generates gaseous nitric oxide emissions, but does not result in any significant liquid organic waste streams (Hocking 2005, USEPA 1998)[5] that would require further management. This process is well known, and does not generate any of the principal contaminants at issue in the LPRSA. The production processes at the Warehouse did not generate or use dioxin/furans, PCBs or Mercury.

[4] De Micromis Policy at 2, 5-6.

[5] Hocking. Handbook of Chemical Technology. 2005; USEPA Office of Air & Radiation. Nitric Acid Production, AP-42. 1998.

From 1976 to 1986 no manufacturing operations were conducted, and the Warehouse was used solely for the storage of finished product engineering plastics and pellets. These warehouse operations ended in 1986-1987.

The site's 1987 sale to Tri-State Manufacturing triggered the State of New Jersey's remediation requirements under the Environmental Cleanup and Responsibility Act ("ECRA") (later amended to become the Industrial Site Recovery Act, or "ISRA"). The ECRA investigation of site soils identified certain inorganics (primarily arsenic and lead) and polycyclic aromatic hydrocarbons (PAHs).[6] Based on these investigations, NJDEP concurred that historic fill was widespread at the site, and the presence of certain metals were likely at the site due to the presence of historic fill.[7,8] A comparison of inorganic concentrations in soils at the Warehouse to historic fill characteristics compiled by NJDEP confirm that the concentrations of these chemicals are consistent with historic fill (See Table 1, below).[9]

[6] NJDEP. Proposed Cleanup Standards for Allied Corporation Dundee Warehouse. June 15, 1992. See Exhibit A.

[7] *See* Allied Signal Engineered Materials (Allied). Remedial Action Report, ISRA Case #87133, Former Dundee Warehouse/Tri-State Manufacturing Facility, Passaic, New Jersey. June 1994. Page 12 (describing distribution of metals at the site as indicative of historic fill); See Exhibit D; *see also* NJDEP. Remedial Action Report Approval and No Further Action, ISRA Case #87133, Former Dundee Warehouse/Tri-State Manufacturing Facility, Passaic, New Jersey. September 26, 1994. See Exhibit B.

[8] NJDEP. 2009. Digital Geodata Series, DGS-4-7 Historic Fill for New Jersey as of February 2009 (showing that the Warehouse is mapped by NJDEP as located within an area of historic fill) (available at: http://www.state.nj.us/dep/njgs/geodata/dgs04-7.htm.NJDEP).

[9] NJDEP, Technical Requirements for Site Remediation, N.J.A.C. 7:26E-4.6(b)3, Table 4-2 (2011).

Table 1. Review of Dundee Warehouse Soil Data and Historic Fill Concentrations					
Chemical Name	**NJDEP Maximum Concentration (mg/kg)**	**NJDEP Average Concentration (mg/kg)**	**Site Shallow Soils (0-6") Maximum Concentration (mg/kg)**	**Site Shallow Soils (0-6") Average Concentration (mg/kg)**	**Site Historic Fill (All Depths) Maximum Concentration (mg/kg)**
Benzo(a)anthracene	160	1.37	30.6	6.21	47.5
Benzo(a)pyrene	120	1.89	22.1	5.38	36.5
Benzo(b)fluoranthene	110	1.91	29.4	6.53	59
Benzo(k)fluoranthene	93	1.79	21.3	4.71	32.9
Indeno(1,2,3-cd)pyrene	67	1.41	11.9	3.59	25.3
Dibenz(a,h)anthracene	25	1.24	7.18	2.03	13.1
Arsenic	1,098	13.15	264	60.38	896
Beryllium	80	1.23	0.8	0.8	0.8
Cadmium	510	11.15	6.1	1.87	6.1
Lead	10,700	574	8,030	1,155	5,350
Zinc	10,900	575	4,160	468	4,160

Honeywell has not located any documents or information evidencing a release of contaminants at this facility to the Passaic River. The ECRA investigation concluded that "previous site activities have not adversely impacted the ground water quality" at the Site.[10] The ECRA investigation also included sediment samples taken upstream and

[10] Environmental Resources Management (ERM). Report of Findings, Determination of Ambient Site Conditions and Phase II Supplemental Sampling, Former Dundee Warehouse, Passaic, NJ. April 29, 1991. Pages 4-2 to 4-3. See Exhibit C.

downstream of the Warehouse, and did not detect evidence of a specific discharge from the Warehouse.[11] Based on this information, the investigation found that "the Site is not impacting the Passaic River."[12]

Based on the conclusions of the ECRA investigation, NJDEP required a land-side remedy addressing soils as the only media of concern, and required no action on river sediments, surface water or groundwater. A simple remedy was completed in 1994, consisting of an asphalt cap for some areas and a permeable geomembrane/stone cap in another area.[13] NJDEP issued a No Further Action letter for the Site in 1994.[14]

1. EPA Has Not Met its Burden to Show a Release to the Passaic River from the Dundee Warehouse

Under CERCLA, EPA bears the burden to show that a party is liable for a release or threatened release of a hazardous substance that causes response costs. *See U.S. v. Alcan Aluminum Corp.,* 964 F.2d 252, 258-259 (3rd Cir. 1992). Here, EPA has not met and cannot meet that burden. Neither EPA's June 2006 General Notice Letter to Honeywell nor the Agency's March 2016 Notice of Potential Liability made any statements at all about the nature or source of Honeywell's liability, either for the lower 17 miles of the Passaic River or specifically for OU 2. The 2006 General Notice Letter, referring broadly to the lower 17 miles of the river, asserted only that Honeywell "may be potentially liable for response costs which the government may incur relating to the study of the Lower Passaic River."[15] That letter provided no details beyond the generic and

[11] ERM. Report of Findings, Determination of Ambient Site Conditions and Phase II Supplemental Sampling, Former Dundee Warehouse, Passaic, NJ, Environmental Resources Management. April 29, 1991. Page 4-3. See Exhibit C.

[12] *Id.*

[13] Allied Signal Engineered Materials (Allied). Remedial Action Report, ISRA Case #87133, Former Dundee Warehouse/Tri-State Manufacturing Facility, Passaic, New Jersey. June 1994. Page 14. See Exhibit D.

[14] NJDEP. Remedial Action Report Approval and No Further Action, Allied Corporation – Dundee Warehouse, ISRA Case #87133, Former Dundee Warehouse/Tri-State Manufacturing Facility, Passaic, New Jersey. September 26, 1994. See Exhibit B.

[15] Correspondence from R. Basso, U.S. Environmental Protection Agency Region 2 to K. Stroup, Deputy General Counsel, Honeywell International Inc., Diamond Alkali

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unspecific statement that "Based on information that EPA evaluated during the course of its investigation of the Site, EPA believes that hazardous substances were released from [the Warehouse] into the Lower Passaic Study Area."[16]

The March 2016 Notice of Potential Liability similarly failed to provide any basis for imposing liability on Honeywell. The letter states only that "EPA has previously notified over 100 parties of their potential liability under CERCLA for the Lower Passaic River Study Area, which includes the lower 8.3 miles. By this letter, we notify all the parties on the attached list of potential liability for the lower 8.3 miles."[17] (This letter did not explain or justify its implicit conclusion that a party that is potentially liable for the LPRSA as a whole is necessarily also liable for response costs at the lower 8 miles.)

While EPA has not provided Honeywell with any basis for the Agency's conclusions regarding Honeywell's liability, Honeywell presumes that EPA is relying on documents submitted to the Agency in 2006 (the "2006 Documents").[18] But the 2006 Documents do not show a release of hazardous substances to the river from the Warehouse. The 2006 Documents, for the most part, are documents from the NJDEP ECRA file, which report minor contamination in the soil at the Warehouse, prescribe a land-based remedy and, as discussed above, document NJDEP's conclusion that activities at the Warehouse did not impact the Passaic River. One document states explicitly that:

> "No known spills have occurred at the facility. The tank filling and washing locations represented areas of increased potential for surface spillage, not actual spills."[19]

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Superfund Site, Notice of Potential Liability for Response Actions in the Lower Passaic River Study Area, New Jersey, June 8, 2006 at 2 (emphasis added).

[16] *Id.*

[17] *See* Diamond Alkali Superfund Site, Lower 8.3 Miles of Lower Passaic River, Essex and Hudson Counties, New Jersey, Notice of Potential Liability under 42 U.S.C. § 9607(a) Commencement of Negotiations for Remedial Design, U.S. EPA Region 2, March 31, 2016 at 3.

[18] The 2006 Documents for Honeywell contain some, but not all, of the documents in the NJDEP ECRA case file on the Warehouse.

[19] ECRA Site Evaluation Submission, 1987. Page 3. See Exhibit E.

Moreover, Honeywell has obtained additional documents which further demonstrate the absence of a release from the Warehouse to the river, including PVSC and NJDEP reports of discharges to the river from several facilities on adjacent properties.[20] If there were discharges from the Warehouse, these would have been identified from similar documents from PVSC and NJDEP. The absence of such documents is an additional line of evidence that no such discharges occurred.

The additional documents obtained by Honeywell also rebut the suggestion in the 2006 documents that a rumored "suspected" or "phantom" drain pipe may have discharged into the river.[21] Such a drain pipe does not appear on any actual site plans or drawings of the facility, and is indicated as a potential connection to the river only on renderings by an environmental consulting firm in 1986.[22] The ECRA files show that NJDEP and Allied agreed to use ground penetrating radar (GPR) to determine if such a "phantom" drain discharging to the river actually existed,[23] and that if GPR confirmed the existence of such a drain pipe, NJDEP would require Allied to take additional sediment samples at the river to determine if discharges via this drain pipe had impacted river sediments.[24] The ECRA files show that NJDEP did not require further sampling or further remediation as a result of the GPR survey. The NJDEP-approved remedy did not require remediation of river sediments, and the Allied Signal's 1994 Remedial Action Report -- approved by NJDEP -- does not mention either a pipe discharging to the river or

[20] These documents can be provided on request.

[21] ERM. Report of Findings, Determination of Ambient Site Conditions and Phase II Supplemental Sampling, Former Dundee Warehouse, Passaic, NJ, Environmental Resources Management. April 29, 1991. Page 2-8; see Exhibit C; NJDEP Correspondence of June 19, 1991 at 3, see Exhibit F (emphasis added); Bureau of Environmental Evaluation and Cleanup Responsibility Assessment, Report of Inspection on December 8, 1988 at 1 (describing a 1988 NJDEP inspection reporting that the building had in the past contained floor drains that discharged into the river, but that the inspector found no evidence of the floor drains at the time of the inspection). See Exhibit G.

[22] ERM. ECRA Sampling Plan, Allied-Signal Incorporated (Dundee Warehouse), Passaic, New Jersey. December 1, 1986 at 2-3 (purporting to show "Approx Location of Discharge of Floor Drain to River"). See Exhibit H.

[23] Summary of Meeting Notes for July 19, 1991, Page 2. See Exhibit I.

[24] ERM. Supplemental Project Tasks, Former Allied-Signal, Dundee Warehouse, Passaic, New Jersey (Draft). January 8, 1992. Page 8. See Exhibit J.

any further sediment samples that would have indicated a positive finding from the GPR survey.

Additionally, we have found documents showing that in 1978, prior to initiation of the ECRA process, Allied conducted a dye test of the sewers from the building floor drains "to ascertain the discharge point(s)"[25] and assess if the floor drains were connecting to the river. The report concluded that "it appears that both the floor drains and sanitary effluents from the warehouse discharge into the municipal sewer system" and "no further modifications are necessary."[26] Honeywell has located site plans and other maps that identify the piping system and other below grade plumbing for the Warehouse. None show a discharge pipe connecting to the river.[27]

In sum, there is simply no documentation of a discharge from the Warehouse to the river. The 2006 Documents on which EPA relied do not show such a discharge. We have researched and obtained additional documents, which further show an absence of a discharge to the river. We have also investigated the alleged "phantom drain," which was subject to GPR and found not to exist. Nothing in the extensive record of the investigation and remediation of this site shows evidence of a discharge to the river. EPA has not and cannot meet its burden to demonstrate a release of a hazardous substance from the Warehouse to the river. Consequently, Honeywell cannot be a liable party for OU 2.

2. <u>EPA Has Failed to Show That a Hypothetical Release from the Dundee Warehouse Could Have Caused Response Costs at OU 2</u>

As shown above, there is no basis for EPA to conclude that there was a discharge from the Warehouse site to the river. But, even if one were to, counter-factually, assume the theoretical possibility that a contaminant from the Dundee Warehouse entered the river, EPA must further show that such a contaminant actually reached OU 2, and caused EPA to incur response costs at OU 2. While CERCLA does not require EPA to make

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[25] Allied Chemical. Trip Reports, Dundee Warehouse. April 5, 1978 at 1. See Exhibit K.

[26] *Id.*

[27] Facility Maps. General Chemical Co. Dundee Works. October 30, 1900 (last corrected March 22, 1918); October 1, 1954; unknown date. Allied Chemical Corporation. October 1974; April 1976). See Exhibit L.

some traditional demonstrations of causation, *see Alcan Aluminum Corp v. U.S.*, 964 F. 2d 252, 264 (3rd Cir. 1992), EPA must still show that a defendant's "release or threatened release caused the incurrence of response costs." *Id.* In a multi-contaminant, multi-party site, the Agency "must demonstrate the existence of a 'plausible migration pathway'" from the defendant's site to the site where the Agency incurred costs. *See Asarco LLC v. Cemex. Inc.*, 21 F. Supp. 3d 784, 807 (W.D. Tex. 2014). EPA must set forth "some specific proof" that defendants "deposited or caused the disposal" of hazardous substances at each specific site where liability is alleged. *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3rd Cir. 1999).

EPA cannot meet that burden here. The Warehouse is far upstream from OU 2 at River Mile 14.9. EPA has not presented any evidence whatsoever that the Warehouse affected the river in OU 2. Further, EPA has not set forth any analysis showing that a hypothetical release at the Warehouse impacted OU 2.

This is not surprising, because EPA itself has stated that there is no significant connection between OU 2 and sites, like the Warehouse, in the upper nine miles. In documenting its remedy decision for OU 2, EPA emphasized the *absence* of a link between sources in the upper 9 miles of the river and OU 2. EPA's OU 2 ROD (page 11-12 17, 18) states:

> "contaminated sediments that are already present on the river bottom in the lower 8.3 miles and that are resuspended and then resettle as a result of natural processes are, by a large margin, the biggest component of recently deposited sediment in the Lower Passaic River (see Section 5.3). In comparison, Upper Passaic River and Newark Bay contributions of COCs are small and *all other sources are minor."* [emphasis added]
>
> "The surface sediments have the most direct consequences on risks to human health and the environment, so understanding current conditions in the surface sediments and predicting future conditions was a central focus of the FFS."
>
> "Based on analyses discussed in the RI Report for the lower 8.3 miles, direct atmospheric deposition, groundwater

> discharge and industrial point sources of contaminants currently are not significant contributors of COC mass (i.e., sediment particles and the COCs bound to them) to the recently deposited sediments of the Lower Passaic River…CSOs and SWOs are minor contributors of COCs, since they are minor contributors of sediment particles compared to the Upper Passaic River and Newark Bay."

In sum, EPA has not shown that a hypothetical release from the Warehouse actually impacted OU 2. EPA's ROD for OU 2 acknowledges an absence of a significant connection between sources outside of the lower 8 miles and impacts within the lower 8 miles. Consequently, Honeywell cannot be liable for response costs at OU 2.

3. Honeywell is Not Joint and Severally Liable for the Contamination at OU 2 Because Honeywell's Liability, if Any, is Divisible.

In addition to our absolute defense against liability because the Agency cannot show a discharge to the river, Honeywell can also show that if there is harm, it is divisible, and thus joint and several liability does not apply. Liability under CERCLA is not joint and several where the harm at issue is theoretically capable of apportionment and where there is a reasonable basis for apportionment. *See Burlington Northern and Santa Fe Railway v. United States*, 556 U.S. 599, 613 (2009); *see also United States v. NCR Corp.*, 688 F. 3d 833, 838 (7th Cir. 2012). Volume, chronology, geography and distinguishing based on contaminants can all form a reasonable basis for apportionment of CERCLA liability. *See Burlington Northern*, 556 U.S. at 617-618.

Here, several factors present a strong case for divisibility. As an initial matter, the contamination in the lower 8 miles involve a distinct part of the river. *See United States v. P.H. Glatfelder Co.*, 768 F. 3d 662, 678 (7th Cir. 2014). Here, there is no evidence that any release of COCs from the Warehouse impacted OU 2 at all. Accordingly, Honeywell cannot be joint and severally liable for contamination at OU 2.

Additionally, divisibility can be based on distinguishing harms caused by different contaminants. *See Burlington Northern*, 556 U.S. at 617. Here, Honeywell is not associated with the principal contaminants driving the remedy at OU 2. EPA has asserted that, while many contaminants of concern have been identified at OU 2,

dioxin/furans and PCBs are the "main risk drivers."[28] Based on its risk assessment, EPA concluded that dioxin/furans and PCBs account for the bulk of the human health and ecological risk at OU 2. It is these contaminants that have driven the selection of the OU 2 remedy. There is no evidence -- and there has been no allegation -- of any dioxin/furan or PCB releases associated with the Warehouse.

Finally, divisibility can also be established based on the volume or mass of contaminants contributed to a site. *See id.* As documented below, even assuming some movement of contamination from the Warehouse to the lower 8 miles, the migration of any such hypothetical contribution to OU 2 would be inconsequential compared to the volume or mass of contamination contributed to OU 2 from other parties and background sources, and would contribute only a de micromis share of the cost of remediating OU 2. Accordingly, even if there is some connection between the Warehouse and OU 2, it is susceptible to apportionment as a de micromis share.

4. <u>If, Hypothetically, Dundee Warehouse Made Any Contribution to the River That Reached OU 2, Such Contribution Is Inconsequential, and Must be Resolved in a De Micromis Settlement</u>

Even assuming *arguendo* that some as yet unidentified release from the Dundee Warehouse reached the Lower Passaic River and somehow migrated six to 14 miles downstream, it would have no more than a de micromis impact on OU 2 sediments. The statutory qualifications for de micromis settlements are disposal, treatment or transport of less than 110 gallons of liquids or 200 pounds of solid materials containing hazardous materials, and all or part of the disposal, treatment or transport occurred before April 1, 2001. *See* 42 U.S.C. § 9607(o).[29]

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[28] EPA ROD, Attachment E: Updated Mechanistic Model. 2016. Page 11-23.

[29] EPA guidance asserts that a party is eligible for a de micromis settlement even where a party may not meet the statutory requirements of Section 107(o) of CERCLA, where "a party's contribution is still a minute percentage of the total waste volume sent to the site," and de micromis settlement should also consider a party's "contribution of hazardous substances in relation to the total volume of waste at the site" and "the toxic or other hazardous effects of such hazardous substances." Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties, U.S. E.P.A., November 6, 2002 at 6.

The Warehouse contribution, if any at all, to OU 2 -- as discussed below -- is a minute percentage of both the total waste sent to the site and to the total volume of contaminated sediment at OU 2. Accordingly, though Honeywell cannot be shown to have discharged contaminants to the river, let alone to OU 2, EPA's policy supports at least a de micromis status for Honeywell.

It is undisputed that the Warehouse, six miles upstream of the OU 2 boundary, has not been associated with any of the compounds that EPA classifies as the primary drivers of the OU-2 remedy -- dioxin/furans or PCBs and Total DDx. As summarized in the OU 2 ROD, dioxins/furans and PCBs are the most significant contributors to the human health risks. According to the ROD, these contaminants contributed 97% of the excess cancer risk and 98% of the non-cancer excess hazard in OU 2.[30] Similarly, dioxins/furans and PCBs are the significant contributors to the ecological risks reported by EPA in the ROD for each of the receptors evaluated.[31] EPA has produced no evidence -- and Honeywell is not aware of any evidence -- that dioxins, furans, Total DDx, or PCBs have been found at or associated with the Warehouse.

Indeed, the few OU 2 chemicals of concern that were also detected in soils at the Warehouse (but which were not discharged to the river) were associated with urban background and historic fill. PAHs were detected at the Dundee Warehouse, but only at levels at or below average background levels established in the ROD (defined as the levels in the Upper Passaic River sediments, *see* ROD at 43). Lead was detected, but also at concentrations consistent with New Jersey historic fill criteria (*see* Table 1, above). The ECRA reports relied upon by NJDEP in rendering a No Further Action determination for the Dundee Warehouse acknowledged that "the site has been filled with non-native material imported to the site."[32]

With respect to mercury, the Dundee Warehouse ECRA investigation detected concentrations above regional background levels in only two of 10 surface soil samples.[33]

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[30] EPA ROD. 2016. Pages 29-30.

[31] EPA ROD 2016, Page 38, and Tables 21-23b.

[32] Allied. Remedial Action Report, ISRA Case #87133, Former Dundee Warehouse/Tri-State Manufacturing Facility, Passaic, New Jersey. June 1994, at 12. See Exhibit D.

[33] Sampling data for the Dundee Warehouse is summarized in the Remedial Action Report, ISRA Case #87133, Former Dundee Warehouse/Tri-State Manufacturing Facility, Passaic, New Jersey. (Allied, June 1994). See Exhibit D. The Passaic River

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As discussed above, there is no evidence of a discharge of mercury to the river from the Warehouse. But any contribution of Mercury to the river would be orders of magnitude below Mercury depositions from background sources. According to NJDEP, much of the mercury contamination in New Jersey is caused by air emissions from long-range sources, such as coal-burning power plants. The Conceptual Site Model for the Lower Passaic River (Malcom Pirnie 2007) quantified that atmospheric deposition of mercury ranges from 11 to 14 ug/m^2/year, which would result in a deposition of 0.46 lbs of mercury per year over the watershed of the Passaic River (approximately 935 mi^2)[34], which is orders of magnitude above any conceivable estimate of Mercury loading from the Dundee Warehouse.

EPA acknowledges in the ROD that EPA policy does not require remediating below natural or anthropogenic background. *See* ROD at 43-44.[35] This particularly makes sense where EPA's RI Report and the OU 2 ROD both concluded that PAHs and metals are ubiquitous in the soils and river sediment throughout the entire region from centuries of urban and industrial activity,[36] as well as from the widespread presence of

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background concentration for mercury is 0.72 mg/kg (USEPA 2016 OU2 ROD, Table 26).

[34] Malcolm Pirnie. Lower Passaic River Restoration Project, Conceptual Site Model, February 2007. Page 7-14; Louis Berger Group, Lower Eight Miles of the Lower Passaic River Remedial Investigation Report for the Focused Feasibility Study, 2014. Page 1-2.

[35] *See also* Contaminated Sediment Remediation Guidance for Hazardous Waste Sites, U.S. EPA, OSWER 9355.0-85, December 2005, at 2-6 ("Generally, under CERCLA, cleanup levels are not set at concentrations below natural or anthropogenic background levels."); Role of Background in the CERCLA Cleanup Program, U.S. EPA, April 26, 2002, OSWER 9285.6-07P at 7 ("Generally under CERCLA, cleanup levels are not set at concentrations bellow natural background levels. Similarly, for anthropogenic contaminant concentrations, the CERCLA program normally does not set cleanup levels below anthropogenic background concentrations.").

[36] For example, USEPA's 2016 OU 2 ROD (page 3) describes that "[B]y the end of the nineteenth century, a multitude of industrial operations, such as manufactured gas plants, paper manufacturing and recycling facilities, petroleum refineries, shipping, tanneries, creosote wood preservers, metal recyclers and manufacturers of materials such as rubber, rope, textiles, paints and dyes, pharmaceuticals and chemicals, had located along the river's banks." Further, the RI Report (Louis Berger Group, Inc. 2014; page 1-3) states that, "[T]he cumulative effect of these [approximately 1,200 Known Contaminated Sites,

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contaminated historic fill[37] material used to raise topographic elevations along the LPRSA.

If EPA were to deny de micromis status to Honeywell based on the presence of historic fill and its associated metals and PAHs, EPA's policies would require it to bring in vast number of other parties that EPA has currently not pursued, including many municipalities and other governmental entities.[38] If Honeywell is liable for OU 2 based on low levels of historic fill contaminants found at the Warehouse (but not discharged to the river), then thousands of other parties bear as much or substantially greater liability.

EPA has provided a benchmark for what it considers to be insignificant contaminant contributions to OU 2. EPA analyzed and characterized contributions to the LPRSA from tributaries, combined sewer outfalls (CSOs), and stormwater outfalls (SWOs) as reported in the 2014 Remedial Investigation (RI) and 2014 Focused Feasibility Study (FFS) reports. Virtually all of the Lower Passaic contaminants of concern were also present in elevated concentrations in tributaries and CSOs and SWOs connected to the Lower Passaic River (see RI Table 4-6; RI Table 4-10). Nonetheless, EPA concluded that "inputs from the CSOs and SWOs [to the LPRSA] are negligible relative to all of the other internal and external sources" (Focused Feasibility Study Report at 1-29). EPA further stated that:

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3 Chromate Waste Sites, 15 NPL Sites and 200 Toxic Release Inventory Facilities as defined by USEPA and NJDEP] and other natural and anthropogenic watershed contaminant sources form a background contaminant discharge over Dundee Dam into the Lower Passaic River."

[37] *See* Historical Fill Material Technical Guidance, NJDEP, Site Remediation Program, April 29, 2013, Version 2.0 (available at http://www.nj.gov/dep/srp/guidance/srra/historic_fill_guidance.pdf) at 4 (defining historic fill as non-indigenous material, "deposited to raise the topographic elevation of the site, which was contaminated prior to emplacement;") and 11 ("[H]istoric fill material is likely to contain contaminants including PAHs and metals at levels in excess of the Department's applicable soil remediation standards." The Dundee Warehouse site is within a regional historic fill material area mapped by NJDEP.

[38] *See* Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes, December 6, 1989, OSWER Directive 9834.13.

> "[C]ontaminant loads from the CSOs and SWOs can only be important if the mean contaminant concentration is roughly 25 times greater than the observed concentration on recently deposited sediment of the Lower Passaic River. This is because the combined solids loads from the CSOs and SWOs (i.e., 2,800 cy/yr) are at least 25 times smaller than the solids load delivered by the Upper Passaic River" (RI, Data Evaluation Report No. 2: Boundary Conditions at 6-3).

EPA thus concluded that "tributaries, CSOs, and SWOs are minor contributors of [contaminants of concern to the LPRSA], since their flows are minor compared to those of the Upper Passaic River and Newark Bay, and their *contaminant concentrations are lower* compared to the surface sediments of the Lower Passaic River main stem". (emphasis added).[39]

Given that there is no evidence of a direct discharge from the Warehouse to the river or OU 2, the potential contribution of contaminants from the Warehouse via runoff over the site soils is insignificant compared to the contaminant loading from CSOs and SWOs.[40] The drainage area of the site is approximately 3.7 acres, compared with an overall drainage area for the Lower Passaic River of 935 square miles (including 805 square miles from the Upper Passaic River). This represents less than one one-hundredth of a percent (0.004%) of the area contributing runoff to the river below the Dundee Dam. Further, when compared with select CSO watersheds that were characterized for the RI, the site drainage area is one to two orders of magnitude smaller, thus contributing significantly less runoff to the river. The Table below summarizes this comparison of the site drainage area with those CSOs characterized in the RI as well as the overall Lower

[39] Louis Berger Group, Lower Eight Miles of the Lower Passaic River Remedial Investigation Report for the Focused Feasibility Study, 2014. Page ES-9.

[40] In comparing the contribution of contaminants from CSOs and SWOs to those from the Warehouse, Honeywell is not opining on whether discharges from CSOs or SWOs might contain COCs such as dioxins or furans which would make these discharges more significant to the remedy. Significantly, the Warehouse is not associated with the contaminants of key concern driving the remediation of the river, dioxin-furans and PCBs, which have been associated with discharges from CSOs and SWOs.

Passaic River, further demonstrating the inconsequential potential for contribution of contaminants, if any, from the Dundee Warehouse to the river.

Comparison of Site Data with Data from Sampled CSOs and the overall Lower Passaic River

Location	Owner/ Permittee	River Mile[1]	Watershed Area (Acres)[1]
Total CSOs/SWOs	Various	--	28,000
Freeman Street CSO	City of Newark	3.9	120
Saybrook Place/Rector Street CSO	City of Newark	5.2	420
Clay Street CSO	City of Newark	5.8	1,700
Fourth Avenue CSO	City of Newark	6.2	200
Verona Ave CSO	City of Newark	7.8	370
Site	--	14.7	3.7
Lower Passaic River	--	--	83,000[2]

Notes:
1. River mile/watershed area data provided in the RI Report (Louis Berger Group 2014)
2. Represents the total contributing area below the Dundee Dam of 130 sq. mi. (i.e. 935 sq. mi. minus 805 sq. mi.)

Conclusion

The record is clear that Honeywell cannot be held liable for remedial costs or for design costs for the remedy for the Lower Passaic River. There is simply no evidence of a discharge of a hazardous substance from the Warehouse to the river. The very limited landside contamination at the Warehouse has been found to be at background levels or consistent with historic fill. Further, EPA has provided no evidence that if a discharge hypothetically occurred that discharge is driving response costs at OU 2.

Despite the absence of evidence of a release, for settlement purposes, Honeywell is prepared to enter into a de micromis settlement with EPA that resolves any further need to participate in or contribute to the remedial design or to the remedy at OU 2.[41]

[41] Honeywell has already paid approximately $3 million in costs for the RIFS, for EPA oversight of the RIFS, and for the Removal Action at River Mile 10.9, payments which Honeywell believes constitute more than its equitable share of liability under any conceivable theory. However, Honeywell is not at this point seeking to recoup any of

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EPA's policies oblige it to consider de micromis settlements with parties with a negligible (or in this case, no) contribution to a site.

We look forward to meeting with you to discuss these issues in greater detail.

Sincerely,

Jeremy C. Karpatkin

Enclosure: Compact Disc containing Exhibits A through L (Password: Honeywell1)

cc: Thomas Byrne, Esq., Honeywell International Inc.

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these costs and is prepared to enter into a de micromis settlement with EPA for future costs.